IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

TOMMY JOE COPLEN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 76-586

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CASES

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Tommy Joe Coplen, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on August 16, 1976.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been officially reported as of this date. A copy of the opinion is printed in

Appendix A hereto. A copy of the order below, denying petitioner's petition for a rehearing and modifying said opinion is printed in Appendix B hereto.

II. JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra) was entered on August 16, 1976. A timely motion for rehearing was denied on September 17, 1976 (Appendix B, infra). On September 30, 1976, the United States Court of Appeals for the Ninth Circuit entered an order dated September 24, 1976 staying the issuance of the mandate pending the filing, consideration and disposition by this Honorable Court of a petition for writ of certiorari provided such petition is filed in the clerk's office of this Honorable Court on or before October 27, 1976. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254 (1).

III. QUESTIONS PRESENTED FOR REVIEW

A. Were warrantless visual intrusions into petitioner's airplane and a subsequent warrantless physical intrusion therein and seizure of debris, a violation of petitioner's Fourth Amendment protections against unreasonable searches and seizures?

B. When considering the evidence presented against the petitioner at trial in a light most favorable to the respondent, should petitioner's motion for judgment of acquittal have been granted?

IV. CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V. STATEMENT OF THE CASE

The petitioner was charged on April 2, 1975, in a three count indictment with conspiring to import marijuana in violation of 21 U.S.C., § 952 (a) and 960 (a) (1) and (b), and with conspiring to possess marijuana with the intent to distribute the same in violation of 21 U.S.C., § 841 (a) (1) and (b); with the illegal importation of marijuana in violation of 21 U.S.C., § 952 (a) and 960 (a) (1) and (b); and with the possession of marijuana with the intent to distribute the same in violation of 21 U.S.C., § 841 (a) (1) and (b). *See Transcript of Record on Appeal*, hereinafter cited as AR, at 29.

The petitioner Coplen raised a pretrial motion to suppress marijuana debris seized from his aircraft on February 20 and 21, 1975, alleging a violation of the Fourth Amendment guaranty against unreasonable searches and seizures. *See* AR at 50, 120. Shortly prior thereto, codefendant McKittrick filed a motion to suppress the five hundred pounds of marijuana seized from his vehicle, alleging the same to have been a warrantless arrest and seizure in violation of the Fourth Amendment to the United States Constitution. This motion was joined in by Petitioner Coplen on June 5, 1975, AR at 53, and by defendant Valenzuela on June 11, 1975, AR at 55. A hearing on the joint motions to suppress was heard by the District Court, the Honor-

able Carl A. Muecke presiding, on June 7, 1975, June 8, 1975, June 11, 1975, and October 10, 1975. *See Reporter's Transcript of Proceedings on Motions to Suppress,* Volume A, hereinafter referred to as MS. Following the taking of testimony and the final arguments of counsel, the court denied the defendants' joint motions to suppress both the marijuana debris seized from the aircraft belonging to Coplen and the five hundred pounds of marijuana obtained as a result of the arrest of McKittrick and the subsequent search of his vehicle. MS at 377-78.

The matter was tried to a jury commencing on October 21, 1975. AR at 163. Following the District Court's denial of defendant Coplen's motion for judgment of acquittal raised pursuant to Rule 29 (a), Federal Rules of Criminal Procedures, 18, U.S.C., and the submission of all evidence to the jury for its deliberation, a verdict of guilty on all counts of the indictment was returned against all three codefendants on October 23, 1975. AR at 244-46. Subsequently, defendant Coplen filed a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, 18 U.S.C., reurging his contention that the District Court erred both in denying his pretrial motion to suppress and his motion for judgment of acquittal submitted at the close of the government's case. AR at 248. On November 24, 1975, the District Court denied Coplen's motion for new trial and entered its order of judgment and commitment, imposing a sentence of five (5) years on each count of the indictment, the sentences to run concurrently; to be followed thereafter by a special parole term of three (3) years. Additionally, defendant Coplen was ordered to pay a fine of five hundred dollars ($500.00) for each of the three (3) counts of the indictment. AR at 259.

The Evidence

The salient facts adduced at the evidentiary hearing on petitioner Coplen's motion to suppress the debris seized from his aircraft logically commence with the United States Customs agent Kontrabecki's visual searches of Coplen's aircraft while parked and tied down at Freeway Airport in Tucson, Arizona. As the transcript reveals, Kontrabecki, consistent with an assignment to conduct surveillance of airports in the Tucson and Phoenix areas, peered into the window of an aircraft bearing registration number NW9286W (hereinafter referred to as 86W) on November 5, 1974, for the sole purpose of observing marijuana debris and gathering evidence of smuggling. MS at 5-6, 48, 50. As luck would have it, he spied "... marijuana debris on the seats and floor of the aircraft." MS at 7.

When questioned concerning his authority for peering in the windows of private aircraft, it was the agent's testimony that he was present at the airport in the same capacity as any other private citizen who comes upon public property. MS at 51.[1] Following Kontrabecki's initial visual search of the aircraft, a registration check was requested from the customs communication sector which revealed the names of the

[1] Subsequently, Kontrabecki indicated that he did not know whether the airport property was public or private. MS at 57. Further testimony elicited at the hearing on July 8, 1975, revealed the existence of two signs at Freeway Airport which specifically notified those walking onto the flight line at the executive terminal that the aircraft ramp is an area restricted by federal aviation regulation. *See* MS at 188.

defendant, Thomas Coplen, and a Verne Olsen as co-owners. MS at 13. Additionally, it was Kontrabecki's testimony that he was apprised at that time that the Drug Enforcement Administration (DEA) in Tucson was investigating Coplen for possible narcotics smuggling charges. MS at 13-14.

After November 5, 1974, the record reveals that Kontrabecki conducted at least seven or eight additional visual searches of 86W but was never again able to observe any evidence whatsoever of marijuana debris or smuggling activity during this period of time. MS at 18,[2] 19,[3] 42-43.

Following the commencement of government surveillance of Coplen's activities on January 2, 1975, MS at 15, it was further adduced at the hearing on the motion to suppress that Gerald Young, customs patrol officer, was requested to investigate the activities of Coplen and his two codefendants on February 20, 1975. He received instructions to launch an aircraft for the purpose of assisting a ground surveillance crew and observing the activities of Valenzuela and McKittrick in an area immediately south of Arizona City. MS at 130-31. After spending some fifteen minutes airborne over this area and searching unsuccessfully for Coplen's aircraft or any other aircraft, MS at 144, Young was advised by radio communication to head for Sky Harbor Airport in Phoenix to look for 86W and "...

[2] Kontrabecki specifically recalled peering into the window of 86W on February 12, 1975, at Sky Harbor Airport in Phoenix, and being unsuccessful in uncovering any evidence of marijuana or any other indicia of smuggling.

[3] On February 18, 1975, another visual search of 86W at Freeway Airport proved abortive.

for marijuana and marijuana debris and contraband ..." which might be contained therein. MS at 133. Indeed, this was the sole purpose testified to by Young for proceeding to the airport in Phoenix. MS at 155-56.

Upon his arrival at Sky Harbor just prior to 10:15 p.m. on February 20, 1975. Young deplaned his aircraft, proceeded to the parked 86W, peered through a window and observed marijuana debris on the floor and under the seats. MS at 133-34. Having subsequently felt the engine and determined that it was warm, he then radioed his observations to other members of the surveillance team. MS at 133, 159. At this point, Young seized the aircraft. MS at 328. Surveillance was then set up to await the return of the pilot. MS at 143.

Young and his co-pilot then proceeded to Sky Harbor terminal in an attempt to ascertain Coplen's whereabouts. They immediately learned from Donald Clark, a refueling employee on duty at Sky Harbor, that he had received a refueling order from Coplen at 9:46 p.m., MS at 175-76, and that Coplen had at that time informed Mr. Clark that he was going to remain in Phoenix overnight.[4] MS at 185. Once Clark communicated the entirety of this information to Agent Young, MS at 186, the customs officials requested that Clark delay fueling of the aircraft. MS at 178. The record further reflects that the aircraft was tied down by chains that were anchored in the *ground and fastened to the wings*. MS at 187.

[4] Indeed, the agents, by their own testimony, had every reason to believe that the pilot of the aircraft would be spending the night at the Sheraton Inn in Phoenix. MS at 322-23, 327.

Following the discussions among the customs officials and Clark, Young and his co-pilot remained with the aircraft until 1:30 a.m. when the identification team arrived. MS at 161,318. Having never considered obtaining a search warrant for the aircraft, MS at 332-33, the agents, with the help of a lock-pick set, entered the aircraft after it had been dusted for fingerprints. MS at 327-28, 332. Following this search, marijuana debris, which eventually formed the basis of Coplen's motion to suppress, was taken from the floor of the aircraft. MS at 323-26.

The evidence elicited at the time of trial substantially duplicates much of the testimony presented at the hearing on defendants' joint motions to suppress. Therefore, where there is no substantial variance between the two, it is petitioner's intention to merely rely upon the facts set forth above without specifically reiterating them a second time.

Kontrabecki testified at the time of trial that on January 2, 1975, following his visual search of 86W and the registration check through communications, he observed a second aircraft at Freeway Airport which bore registration number N3988G (hereinafter referred to as 88G). *See Transcript of Trial Proceedings*, hereinafter cited at TR, Vol. I at 7. Although no testimony was presented at the time of trial concerning the registration and ownership of 88G Kontrabecki testified that on January 5, 1975, he observed Coplen climb in 88G at Freeway Airport and engage in several

short field landings and takeoffs.[5] TR, Vol. I at 13.

Following the next several weeks during which Kontrabecki persisted in visually examining 86W and 88G unsuccessfully for marijuana debris, he was notified on February 20, 1975, by Customs Agent Harper, that he, Harper, had observed Valenzuela driving a pickup truck at approximately 5:00 p.m. in the Tucson area. TR, Vol. I at 19, 20, 56, 58. Following Harper's discontinuance of his surveillance of Valenzuela,[6] Kontrabecki picked up the ground surveillance at approximately 5:00 p.m. or a few minutes thereafter. TR. Vol. I at 12. Shortly after 5:00 p.m. and the resumption of the surveillance by Kontrabecki, the latter testified that he observed Valenzuela pick up Coplen at a convenience market and proceed to Freeway Airport where Valenzuela left Coplen at 5:40 p.m. TR, Vol. I at 40. Coplen was then observed to climb inside 86W and commence preparations for takeoff as Valenzuela departed the airport in his pickup. TR. Vol. I at 21-22. Following 86W's takeoff at 5:45 p.m., TR. Vol. I at 40, Kontrabecki requested customs pilot Parthen to launch a surveillance aircraft. TR. Vol I at 23.

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[5] Warren Parthen, a United States Customs pilot who participated in the investigation of this case, testified that these so-called short field landing and takeoffs constitute normal flight practice for one undertaking early training. TR, Vol. I at 99.

[6] Agent Harper testified that prior to the discontinuance of his visual ground surveillance that he observed Valenzuela drive a pickup truck to an apartment complex where McKittrick lived and departed that complex shortly thereafter with a second unidentified person. TR at 57. Harper's further testimony was that he was never able to identify another person with Valenzuela before he terminated surveillance. TR at 59-60.

Once Parthen became airborne, Kontrabecki followed Valenzuela to a Tucson taco stand where he met McKittrick who arrived shortly thereafter in a second vehicle. TR. Vol. I at 24-25. As Parthen proceeded to follow 86W once it had become airborne, Kontrabecki was simultaneously maintaining surveillance on Valenzuela and McKittrick who proceeded to a gas station, briefly used the pay telephone, and then drove together in their separate vehicles to Interstate Route 10 (I-10), northbound toward Casa Grande. TR. Vol. I at 26. At this juncture, Kontrabecki requested and received aerial surveillance from a second aircraft piloted by John Redden and equipped with an observer, Scott Eshelman. TR. Vol. I at 27. Kontrabecki maintained surveillance of the two vehicles until they exited I-10 at Toltec at approximately 7:25 p.m., at which point a flat tire forced him to discontinue his investigation. TR. Vol. I at 28.

According to Eshelman's testimony, he and Redden joined the surveillance from the air in the area of the Toltec intersection near Cox Ranch at approximately 8:00 p.m. TR. Vol. I at 105,118. The record then reveals that the two observed Valenzuela and McKittrick proceed in their respective vehicles to the Cox Ranch area where they turned off their lights. TR. Vol. I at 108. Over an hour later, Eshelman testified that he then observed the two vehicles facing each other with their light on, TR. Vol. I at 111, and that some two to three minutes prior to this he had received notification from the ground crew that the noise of a low-flying airplane had been heard in the vicinity at approximately 9:15 p.m. TR. Vol. I at 113-114; Vol. II at 214, 247-48. Eshelman then added that after he

observed the lights of the vehicles come on, that he saw an aircraft landing light illuminating the area for approximately thirty seconds. TR. Vol. I at 114-115. This was thought to have occurred at 9:12 or 9:13 p.m. TR. Vol. I at 55. Upon further examination however, Eshelman admitted that the written reports of those to whom he had reported this observation (Harper and Kontrabecki) contained no mention of any aircraft landing light on the evening in question. TR. Vol. I at 120-21; Vol. II at 141, 146. Consistently, William Loughridge, a member of the ground crew, testified that no landing lights were ever seen on the aircraft that he heard or on any other aircraft on the night in question. TR. Vol. II at 249-50, 251, 254, 260, 290-91.

Shortly thereafter, the third customs aircraft of the evening was summoned to the Cox Ranch area, TR. Vol. I at 115, now equipped with an infrared system with the admitted capability of detecting the presence of an airplane whether on the ground or in the air. TR. Vol. II at 182. Although the pilot of this third aircraft advised Eshelman that he was able to observe the two vehicles on the ground approximately one-half mile west of Cox Ranch at 9:25 p.m., TR. Vol. I at 116; Vol. II at 158, 167, at no time did anyone either on the ground or in the air, ever see any private aircraft in the vicinity. TR. Vol. II at 144, 160, 181-82.

Having unsuccessfully combed the Arizona City area for the rendezvous aircraft, Young flew to Sky Harbor Airport where he landed his aircraft at approximately 10:15 p.m. As previously indicated, he then observed aircraft 86W parked and tied down without a pilot, approached the plane, peered in one of the windows, and observed marijuana debris on the floor behind the

seats. It was after this that he then felt the engine of 86W and determined that it was warm. TR. Vol. II at 162. It should be recalled that after this visual search Young was informed by Donald Clark of Coplen's request for fuel at 9:46 p.m., TR. Vol. II at 191, and that Agent Loughridge had received a telephone call from Larpy [sic Hjerpe] at 9:45 p.m. wherein he communicated to Loughridge the fact that 86W was parked at Sky Harbor Airport. TR. Vol. II at 230. The aircraft was then seized and searched in a manner accurately depicted by the testimony set forth above which was elicited at the time of the hearing on the joint motions to suppress.

Finally, pilot Parthen testified that simultaneous with the occurrence of the aforementioned events, and during the course of his surveillance of 86W which began at Freeway Airport in Tucson, he observed the aircraft take off at 5:45 p.m. and eventually head southbound across the Mexican border at 6:23 p.m. TR. Vol. I at 83. Although Parthen was unable to identify the pilot of the subject aircraft, he continued the surveillance of 86W to a point approximately twenty miles southeast of Caborca where he lost visual contact with the aircraft at 7:15 p.m. (TR. Vol. I at 84) at an altitude of approximately five thousand feet. TR. Vol. I at 86.

Although Parthen testified that the area over which he lost contact with 86W was one "commonly used to pick up marijuana," TR. Vol. I at 86, and that he further observed two vehicles with flashing lights leave the area below in a northbound direction, TR. Vol. I at 87, he not only did not observe the aircraft land in Mexico, but neither he nor anyone else ever saw 86W

again until approximately 10:00 p.m. that evening at Sky Harbor Airport in Phoenix. TR. Vol. I at 98.

Although evidence elicited at the time of trial demonstrated the absence of any record of 86W registering a crossing into the United States from Mexico on February 20, 1975, TR. Vol. II at 204-205, testimony from Mr. Walker, Assistant Director of Investigation for the Immigration Service, further failed to demonstrate that the same constituted a violation of either a customs or an immigration service regulation. TR. Vol. II at 206-207.

Following the close of the government's case-in-chief on October 23, 1975, petitioner Coplen's motion for judgment of acquittal alleging insufficiency of the evidence was denied. TR. Vol. III at 350. Immediately prior to the court's ruling, the following colloquy concerning the arrival of 86W at Sky Harbor Airport took place between the court and counsel:

> "THE COURT: — Yes, all right, as I remember it, and I remember it well, it is correct and I have it in my notes that there was testimony by Agent Loughridge that he had a radio, received a radio message from Harper that around 9:45 the suspect plane had landed at Sky Harbor so that is there as far as I'm concerned. Now as far as the fueling, they got there at 10:15, saw that debris, went and talked to the refueling man and he had already received a refueling order, so we know that the order was sometime between 9:45 when the plane landed and 10:15; and he testified concerning some time right after 10:15 or 10:30 or whatever time it took to go from the plane into talking with the refueling man —

"MR. DRAKE: — If Your Honor please, now I don't disagree with the proposition that has been brought forward or stated by the defendant for viewing the evidence on a motion for acquittal, but I feel that as —

"THE COURT: Well, I don't think you have to do any more talking, I've heard enough —

"MR. FLYNN: — Excuse me, Your Honor, only if the Court please in relation to the evidence just recited by the Court, the evidence is correct in relation to that time that he heard, that Agent Harper told him that the plane had landed at 9:45, not that the plane had landed but at 9:45 he was talking to Agent Harper, and in the motion to suppress the evidence was clear that he was the agent who recalled or who testified as to a call to the tower and as to the time but Agent Loughridge did not testify that Agent Harper said it was 9:45 that the plane landed at Sky Harbor.

"THE COURT: Yes he did.

"MR. FLYNN: But that at 9:45 he talked to Agent Harper and said that the plane had landed but not when.

"THE COURT: Yes he did.

"MR. FLYNN: I think there's a substantial difference if the Court please as to the time that the plane arrived.

"THE COURT: Well I think that's a good thing that you can argue to the jury but I'll deny your motion of acquittal. Do you gentlemen have anything else to present? Do you have any further testimony?" TR. Vol. III at 348-50.

After a brief presentation of the defendant's case-in-chief, the jury began its deliberations at 3:30 p.m., returning with a verdict of guilty on all counts as to all of the defendants several hours later that same day. AR at 244-46.

VI. REASONS FOR GRANTING THE WRIT

A. With respect to Question A, Part III hereof, the writ should be granted because the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Honorable Court.

In order to justify a search as falling within the exception which has come to be referred to as the "plain view" doctrine, it is clear that there must exist some prior justification for the initial intrusion. Thus, the cases are quite clear in their requirement that, absent a search warrant or the existence of a search incident to a lawful arrest, the discovery of the evidence sought to be utilized by the government be an inadvertent and coincidental consequence of the prior unrelated, yet legitimate, intrusion. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed.2d 564 (1971).[7] Moreover, even assuming a search can be properly viewed as legitimately inadvertent within the meaning of the exception, the "plain view" doctrine

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[7] "... The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." 403 U.S. at 471.

requires the use of a warrant or the existence of exigent circumstances justifying a warrantless search. *Coolidge v. New Hampshire, supra,* 403 U.S. 443.

In the instant case, the testimony elicited at the time of trial and referred to above clearly establishes the absence of both the elements of inadvertence and exigent circumstances. Because the visual intrusions testified to below involved nothing more than visual searches by the agents in an attempt to uncover incriminating evidence of narcotics smuggling, it cannot honestly be argued that the same was accidentally uncovered and wholly inadvertent to a prior legitimate purpose. Nor can it be said that any showing was made of the existence of exigent circumstances justifying the warrantless intrusion into the aircraft following the visual observations. To the contrary, as previously indicated, the government agents reasonably believed that the aircraft would remain immobile and unmolested throughout the remainder of the night and that its suspected pilot, Coplen, would not return until morning. Therefore, in view of the existence of a specific governmental intent to discover evidence of crime in this case, the government's subsequent contention that the same was justified as falling within the "plain view" exception represents nothing more than a bootstrap argument to justify its intrusion into Coplen's zone of reasonably expected privacy, and the Court of Appeals decision upholding the search is contrary to *Coolidge v. New Hampshire, supra.*

B. With respect to Question B in Part IV, supra, the writ should be granted because the Court of Appeals decision has so far sanctioned a lower court's departure from the accepted and usual course of judicial

proceeding as to call for an exercise of this Court's supervisory power.

The Court of Appeals states in its opinion (Appendix A, infra, p.9a) that during Coplen's flight he flew without filing the required flight plan and that he failed to clear customs after landing. Nowhere in the record is there an indication of any evidence elicited at the time of trial demonstrating the existence of a requirement that a flight plan be filed. In this regard, petitioner herein would respectfully submit that his failure to engage in activity which is in no way required of him should not be allowed to form the basis of evidence somehow demonstrating a consciousness of guilt. Indeed, testimony from Mr. Walker, Assistant Director of Investigation for the Phoenix Immigration Service, revealed that Coplen's failure to register his crossing into the United States did not constitute a violation of any immigration service regulation unless the pilot had actually landed on foreign soil prior to his flight into the United States, TR. Vol. II at 206-07.

Next, although the record does support the Court of Appeals statement that the sounds of a low-flying aircraft were heard in the Silver Bell Estates area, it is respectfully submitted that the inference that that sound emanated from Coplen's aircraft is indeed mere speculation. Such an inference first requires the assumption that the noise came from a private aircraft and that that private aircraft was 86W. Again, it would appear that the Court of Appeals has overlooked the fact that no evidence was ever adduced at the time of trial of Coplen's actual arrival time at Sky Harbor Airport on the night in question. Rather, the evidence merely demonstrates that Coplen filled out a fuel ser-

vice request at 9:46 p.m. TR. Vol. II at 186-89. Thus, it is equally as plausible to assume that Coplen may well have landed at Sky Harbor prior to 9:00 p.m. on February 20, 1975. This being the case, it then becomes impossible to infer that the sounds of low-flying aircraft heard in the Silver Bell Estates area at 9:15 p.m. (TR. Vol. I at 113-14, and Vol. II at 214) came from Coplen's aircraft. In this regard, appellant would reiterate the well-established principle that evidence susceptible of two constructions or inferences, each of which appears to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, requires the adoption of the inference or construction admitting of the defendant's innocence and rejecting that supporting his guilt. *United States v. Zumpano*, 436 F.2d 535, 538 (9th Cir. 1970); *Thomas v. United States*, 363 F.2d 159, 162, n.7 (9th Cir. 1966). Although the Court of Appeals then concludes its analysis by pointing to the fact that marijuana debris was found shortly thereafter in Coplen's airplane, it fails to take account of the fact that this was some sixty to eighty miles from the location of the other two alleged conspirators and the five hundred pounds of contraband which they were found to have actually possessed.

Finally, the Court of Appeals in its opinion originally stated that Coplen prior to the day in question (February 20, 1975), ". . . was seen with his codefendants on many occasions." (Appendix A, p.9a, ll 14-15)

This language was corrected by the September 17, 1976 order (Appendix B) to read "was seen with codefendant Valenzuela prior to the day of arrest", when it was pointed out in the petition for rehearing that

nowhere in the entire three volumes of transcripts contained as part of the record on appeal, was there any evidence placing Coplen in the company of his codefendant McKettrick prior to the day in question, and that, in fact, the only time prior to February 20, 1975, that Coplen was seen with either of the alleged conspirators was on February 12, 1975, when he was seen with Valenzuela in the waiting room of Sawyer Aviation Building at Sky Harbor Airport. In spite of the correction of the opinion in this regard, the Court of Appeals appears to have drifted from the well-established principle of criminal law of conspiracy that mere association with other alleged conspirators is insufficient to establish another person as a member of a conspiracy. *United States v. Cirillo*, 499 F.2d 872 (2d Cir. 1974), *cert. denied* 419 U.S. 1056 (1975); *United States v. Morado*, 454 F.2d 167 (5th Cir. 1972); *Nipp v. United States*, 422 F.2d 509 (10th Cir. 1970), *cert. denied* 399 U.S. 913 (1971); *Hill v. United States*, 379 F.2d 811 (9th Cir. 1967).

On the basis of the foregoing, it is respectfully submitted that the facts as set forth in the record below represent too thin a reed upon which appellant's convictions should be allowed to rest. Not only has the Court of Appeals overlooked and misapprehended those facts in affirming the lower court, but its decision of August 16th as amended as it now stands is at odds with that Court's previous judicial standards relating to that degree of evidence upon which jurors could reasonably arrive at the conclusion that the defendant was guilty of the offenses beyond a reasonable

doubt. *See, e.g., United States v. Epperson*, 485 F.2d 514 (9th Cir. 1973); *United States v. Childs*, 457 F.2d 173 (9th Cir. 1972).

VII. CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

FLYNN KIMERER THINNES & DERRICK

By _____
Robert B. Hoffman
Attorneys for Petitioner

October , 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. TOMMY JOE COPLEN, *Defendant-Appellant.*	No. 75-3633
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. HENRY VALENTIN VALENZUELA, *Defendant-Appellant.*	No. 75-3739
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN BALMER MCKITTRICK, *Defendant-Appellant.*	No. 75-3663

OPINION

[August 16, 1976]

Appeal from the United States District Court
for the District of Arizona

Before: BARNES, KENNEDY, Circuit Judges, and EAST,* District Judge

* Honorable William G. East, Senior District Judge, District of Oregon, sitting by designation.

BARNES, Senior Circuit Judge:

On November 5, 1974, United States Customs Agent Kontrabecki conducted a routine investigation to discover smuggling activity at Freeway Airport, Tucson, Arizona. During this investigation, he discovered marijuana debris in an aircraft registered to Tommy Joe Coplen. Thereafter, Coplen and his aircraft were kept under surveillance by federal authorities.

On February 20, 1975, defendant Valenzuela (under observation) drove Coplen to Freeway Airport. Thereafter, Coplen departed in his plane (under observation) and flew into Mexico, south of Caborca, Mexico, located approximately sixty miles from the American border. Coplen departed for this flight without filing the required flight plan. He also failed to activate the aircraft navigation lights when it became dark, at approximately 6:30 to 7:15 p.m.

After dropping Coplen off at the airport, Valenzuela met defendant McKittrick at a restaurant. They then entered their separate vehicles and left Tucson, heading north on Interstate 10 (under observation). Both vehicles left Interstate 10 at the Toltec Road Exit and proceeded south towards Arizona City, finally entering Silver Bell Estates, a known narcotics drop point. Once into Silver Bell Estates, the vehicles extinguished their headlights.

Approximately an hour later aerial surveillance observed the headlights of two stationary vehicles facing each other approximately one-half mile apart. Although Customs Air Officer Eschelman was unable to testify that these vehicles were the same ones he had been following earlier, he stated that no other vehicles

were detected to have entered the area. He further testified that the headlights appeared to have been lighting up a runway located on a dry lake bed. Shortly before the vehicular headlights appeared, ground surveillance units heard an aircraft but were unable to detect its location since it was operating without navigational lights. Shortly after the vehicular headlights were turned on, aerial surveillance observed an aircraft in the vicinity of the lights. Shortly thereafter, the vehicles extinguished their headlights.

At 9:25 p.m., approximately fifteen minutes after the vehicle headlights were turned off, aerial surveillance units using infrared equipment detected two vehicles leaving the dry lake bed area. Ground surveillance units observed the vehicles leaving the area, heading toward Interstate 10, and entering the Interstate northbound to Phoenix. Agent Seaver testified that the curtains on the camper portion of one of the vehicles were closed on departure, while they had been opened when the vehicles arrived at Silver Bell Estates.

While ground surveillance units were returning to Interstate 10, aerial surveillance units proceeded to Sky Harbor Airport in Phoenix. Upon arrival, the officers observed that Coplen's aircraft had landed without clearing customs and that Coplen was not present. Officer Young approached the aircraft and with the aid of a flashlight looked into the back window on the pilot's side. He saw marijuana debris in the aircraft. He then felt that the engine was warm. Thereupon, the officer advised the surveillance units of his information.

The vehicle driven by Valenzuela left Interstate 10 and was stopped by agents. A search of the camper revealed no contraband. This information was relayed to the agents following McKittrick's vehicle who then stopped him. A search of McKittrick's camper revealed 500 pounds of marijuana. Thereupon, both Valenzuela and McKittrick were arrested. Attempts to locate Coplen, however, proved unsuccessful. After waiting until the identification team had taken fingerprints off the plane, the agents, with the aid of a lock-pick set, entered the aircraft and seized the marijuana debris. Coplen was arrested the following morning.

The three defendants were charged as follows: Count I—all three defendants were charged with conspiracy to import 500 pounds of marijuana; count II—Coplen alone was charged with importation of the same five hundred pounds of marijuana; count III—all three defendants were charged with possession with intent to distribute the same 500 pounds. The defendants moved to suppress the marijuana debris taken from Coplen's airplane and the 500 pounds of marijuana found in McKittrick's vehicle, alleging that their fourth amendment rights had been violated. Each motion was denied. After trial, all three defendants were convicted on counts I and III and Coplen alone on count II.

The first issue that we consider on appeal is whether appellants' fourth amendment rights were violated when the federal agents searched Coplen's aircraft and seized the marijuana debris. The uncontroverted evidence is that Agent Young discovered the marijuana debris when he looked into the aircraft with the aid of a flashlight. Subsequently, the agents, with the aid of a

lock-pick set, entered the airplane and seized the marijuana debris.

Our first inquiry is whether Agent Young's conduct in looking into the airplane constituted a search. The law is clear that it was not. It is well settled that visual observation by a law enforcement officer situated in a place where he has a right to be is not a search within the meaning of the fourth amendment. *See United States vs. Connor*, 478 F.2d 1320, 1323 (7th Cir. 1973); *United States v. Hanahan*, 442 F.2d 649, 653 (7th Cir. 1971); *United States v. Freeman*, 426 F.2d 1351, 1353 (9th Cir. 1970); *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969). This Court, however, must also determine whether the looking into the aircraft violated appellants' reasonable expectation of privacy. If an individual knowingly exposes his conduct to public view, his reliance upon privacy is unreasonable and unjustified. *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *see United States v. Santana*, ___ U.S. ___, 44 U.S.L.W. 4970, 4971-72 (1976). In *Ponce v. Craven*, *supra*, police officers, while standing in a motel parking lot, witnessed illegal activity by looking into the defendant's bathroom window. In rejecting the contention that such conduct constituted a search and that such search was illegal, this Court stated:

> "Ponce's reliance on privacy in his motel room was not reasonable under the circumstances. If he did not wish to be observed, he could have drawn his blinds. The officers did not intrude upon any reasonable expectation of privacy in this case by observing with their eyes the activities visible through the window . . . ."

409 F.2d at 625; *see United States v. Hersh*, 464 F.2d 228, 229-30 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972).

Similarly here, we decline to conclude that the agent's conduct in looking into the airplane constituted a search within the meaning of the fourth amendment. In this case, the agent was lawfully within the area where Coplen's aircraft was parked. He proceeded to the aircraft and looked into the back window which was open to the public view. The fact that the officer was forced to use a flashlight is immaterial. Being dark outside, it was necessary to employ such a device. Rather, if privacy were desired here, Coplen should have closed off the window from public view. By failing to do so, thus permitting the agent by mere observation to view the marijuana debris, there was no reasonable expectation of privacy insofar as looking into windows is concerned.

We next consider the question whether the officers, by breaking into the plane and seizing the marijuana debris without a search warrant, violated appellants' fourth amendment rights. Upon viewing the marijuana debris through the plane window, it is clear that the agents had probable cause to search and seize the aircraft. But, as observed by Justice Stewart in *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971), "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" Thus, the essential inquiry here is whether exigent circumstances existed to justify the warrantless search and seizure.

We conclude that sufficient such exigent circumstances were present here. Coplen's airplane was parked on a runway and was "readily accessible to anyone who might want access." *United States v. McClain*, 531 F.2d 431, 434 (9th Cir. 1976). Agents reasonably believed that other confederates were involved in the scheme. As importantly, easily destroyed contraband was involved. Taking these factors into account, we have a situation where an aircraft was capable of removal and the marijuana debris also was capable of being destroyed. Accordingly, we hold that the search of Coplen's airplane and the seizure of the marijuana debris did not violate the fourth amendment. *See United States v. McClain, supra*, 531 F.2d at 433-35; *United States v. Church*, 490 F.2d 353, 354-55 (9th Cir. 1973), *cert. denied*, 416 U.S. 983 (1974); *United States v. Cohn*, 472 F.2d 290, 292 (9th Cir. 1973).

We next consider the second issue raised by appellants, namely, that the district court erred in denying defendant McKittrick's motion to suppress the 500 pounds of marijuana seized from his camper. Appellants argue that this search and seizure violated their fourth amendment rights. We do not agree. The evidence presented to the trial court overwhelmingly indicates that the agents had probable cause to conduct the search and seizure in question. Both Valenzuela and McKittrick were seen with Coplen on several occasions. On the day of the alleged transaction, both vehicles were seen in the Silver Bell Estate area. Approximately an hour after McKittrick and Valenzuela arrived at the area, agents detected the sound of a low-flying aircraft. Shortly thereafter, ve-

hicular headlights were facing each other on the dry lake bed as though lighting up an airstrip. Shortly after the airplane had departed from the dry lake bed, two vehicles were observed running without headlights. When the vehicles McKittrick and Valenzuela were driving departed from the area, the curtains on them were closed while they had been opened when the vehicles entered the area. Further, Valenzuela had driven Coplen to the airport for his flight and then had met McKittrick before they both drove out to the Silver Bell Estates area. Marijuana debris subsequently was discovered in Coplen's aircraft and this information was communicated to the other agents who then stopped and searched the vehicles. With this abundance of information, we clearly cannot hold that the district court's decision denying the motion to suppress was error. *See United States v. Westover*, 511 F.2d 1154, 1155-56 (9th Cir.), *cert. denied*, 422 U.S. 1009 (1975); *United States v. See*, 505 F.2d 845, 855 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).[9]

As a separate and distinct point on appeal, defendant Coplen submits that the district court committed reversible error by denying his motion for judgment of acquittal. Viewing the evidence in a light most favora-

[9] We note that the government has not argued that the defendants lack standing to contest the searches and seizures in question. Upon examining the record, we observe that there is a substantial issue whether all of the defendants have standing to contest each search and seizure. It is clear, however, that at least one defendant has standing in regard to each search and seizure. Since we hold that the searches and seizures do not violate the fourth amendment, we find it unnecessary to determine whether each defendant has standing to contest each search and seizure.

ble to the government, *Glasser v. United States*, 315 U.S. 60 (1942), Coplen argues that there was insufficient evidence to support his convictions. We disagree. The standard we employ is whether the jurors could reasonably arrive at their conclusions that Coplen was guilty of the charged offenses beyond a reasonable doubt. *See United States v. Rojas*, 458 F.2d 1355, 1356 (9th Cir. 1972); *United States v. Nelson*, 419 F.2d 1237, 1243 (9th Cir. 1969).

Applying this standard, the trial court correctly denied Coplen's motion. Coplen was seen with his codefendants on many occasions. On the day in question, Valenzuela had driven him to the airport. Although none of the agents saw Coplen land in Mexico, his plane was seen sixty miles inside Mexico. During this flight, Coplen flew without filing the required flight plan and failed to clear customs after landing. Coplen makes much of the fact that no authorities saw him land in the Silver Bell Estates area. However agents heard the sounds of a low-flying aircraft and observed the turning on of vehicular headlights apparently lighting up a runway on the dry lake bed. Further, marijuana debris shortly thereafter was found in Coplen's airplane. Viewing the evidence in a light most favorable to the government, we conclude that Coplen's convictions are supported by sufficient evidence.

As another separate and distinct point on appeal, defendant Valenzuela argues that the district court abused its discretion by denying his motion to sever. In support of his motion, Valenzuela contends that he was denied the use of exculpatory testimony of his codefendants who refused to testify at the joint trial

because they would incriminate themselves. We note that the defendant must make some showing that the testimony of a codefendant will be used at his trial before the denial of a motion to sever will be held to be an abuse of discretion. Hence, "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous." *United States v. Bumatay*, 480 F.2d 1012, 1013 (9th Cir. 1973). Further, "[t]he bare assertion that [defendant] could not call either co-defendant as a witness does not warrant reversal on the theory that if he could he would have done so." *Id. See United States v. Larios-Montes*, 500 F.2d 941, 944 (9th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975); *United States v. Thomas*, 453 F.2d 141, 144 (9th Cir. 1971), *cert. denied*, 405 U.S. 1069 (1972). Here, Valenzuela failed to make any showing other than his mere assertion that a joint trial would be prejudicial. Under the law in this Circuit, such a showing is inadequate. Accordingly, the district court was correct in denying the motion.

Having considered the issues raised on appeal and finding no merit in them, the convictions are *affirmed*.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. TOMMY JOE COPLEN, *Defendant-Appellant*.	No. 75-3633
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. HENRY VALENTIN VALENZUELA, *Defendant-Appellant*.	No. 75-3739
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHN BALMER McKITTRICK, *Defendant-Appellant*.	No. 75-3663 ORDER

Before: BARNES and KENNEDY, Circuit Judges, and EAST,* District Judge.

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* The Honorable William G. East, Senior Judge, District of Oregon, sitting by designation.

The Opinion in the above entitled matter, filed with this Court on August 16, 1976, is modified by striking the words "co-defendants on many occasions", appearing in the slip opinion, page 7, lines 2 and 3, and inserting in place thereof, "co-defendant Valenzuela prior to the day of arrest."

With this modification, the Petition for Rehearing is unanimously denied by the panel.

No. 76-586

In the Supreme Court of the United States

OCTOBER TERM, 1976

TOMMY JOE COPLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 541 F. 2d 211.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1976. A petition for rehearing was denied on September 17, 1976 (Pet. App. 1b-2b). The petition for a writ of certiorari was not filed until October 27, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The court of appeals entered an order staying the issuance of its mandate (Pet. 2). That order did not, however, extend the time within which to file a petition for a writ of certiorari, which runs

QUESTIONS PRESENTED

1. Whether law enforcement officers must obtain a warrant before using a flashlight to illuminate the interior of an airplane, the windows of which are exposed to common view.

2. Whether the evidence was sufficient to support the conviction.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiracy to import and to possess approximately 500 pounds of marijuana, in violation of 21 U.S.C. 846 and 963; of unlawful importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1) and (b); and of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b).[2] He was sentenced to concurrent terms of five years' imprisonment, to be followed by three years' special parole, and was fined a total of $1,500. The court of appeals affirmed (Pet. App. 1a-10a).

The facts are recounted by the court of appeals (Pet. App. 2a-4a). Federal agents, their suspicions aroused by a prior discovery of marijuana debris in petitioner's airplane, observed Henry Valenzuela drive petitioner to Freeway Airport, in Tucson, Arizona, where petitioner entered his plane and (followed by an agent) flew to Caborca, Mexico, an area known to Customs agents as a frequent rendezvous point for drug traffickers (I Tr.

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from the date of judgment or of the denial of a timely petition for rehearing. *Department of Banking* v. *Pink*, 317 U.S. 264, 266; *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548, 551-552.

[2]Henry Valentin Valenzuela and John Balmer McKittrick were convicted of conspiracy and possession. They were not charged with importation.

85-86).[3] Although he was aloft after dark, petitioner did not activate the aircraft's navigation lights (I Tr. 86-87). As petitioner's plane began to descend in Mexico, the agent following him observed flashing automobile lights on the ground below, signifying a place where the plane could land (I Tr. 88).

In the meantime, Valenzuela had driven to a restaurant, where he met John McKittrick. Valenzuela and McKittrick drove separate camper vehicles to Silver Bell Estates, Arizona, known to the agents as a place used by narcotics dealers (I Tr. 110). The campers faced each other from a distance with their headlights illuminating a dry lake bed. The agents observed a plane fly in at a low altitude between the two campers.[4] Shortly thereafter the campers extinguished their headlights and drove away in the direction of Phoenix.

While ground surveillance agents followed the campers, aerial surveillance agents flew to Sky Harbor Airport in Phoenix. They found that petitioner's aircraft had returned from Mexico without clearing Customs. The engine of the plane was still warm (II Tr. 162). With the aid of a flashlight, an agent looked through a window of the plane and saw marijuana debris. The agents relayed this information to the ground units, who then stopped the two campers; they found 500 pounds of marijuana in the McKittrick camper. After they were unable to locate petitioner, the agents entered the locked airplane and seized the marijuana debris. The debris and the 500 pounds of marijuana were introduced in evidence at trial (II Tr. 162, 198, 283).

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[3]"I Tr." through "III Tr." designate the transcripts of trial.

[4]The agents were able to identify the engine of the airplane as reciprocating; petitioner's plane also had a reciprocating engine (II Tr. 150, 215-216).

ARGUMENT

1. Petitioner contends that both the visual inspection of the interior of his plane and the entry into the plane without a warrant violated the Fourth Amendment.

The act of the agent in looking through the window of the plane was not a "search." Visual observation by a law enforcement officer situated in a place where he has a right to be does not require prior judicial approval. *United States* v. *Santana*, No. 75-19, decided June 24, 1976; *Air Pollution Variance Board of Colorado* v. *Western Alfalfa Corp.*, 416 U.S. 861; *United States* v. *Lee*, 274 U.S. 559; *United States* v. *Hood*, 493 F. 2d 677, 680 (C.A. 9); *United States* v. *Conner*, 478 F. 2d 1320, 1323 (C.A. 7); *Williams* v. *United States*, 404 F. 2d 493, 494 (C.A. 5). The Fourth Amendment does not protect what a person knowingly exposes to public view. *Katz* v. *United States*, 389 U.S. 347, 351-352. Moreover, the use of a flashlight to illuminate a dark area does not change this analysis, as the Court held in *Lee*.[5] Rather, the court of appeals properly concluded (Pet. App. 6a):

> The fact that the officer was forced to use a flashlight is immaterial. Being dark outside, it was necessary to employ such a device. Rather, if privacy were desired here, Coplen should have closed off the window from public view. By failing to do so, thus permitting the agent by mere observation to view the marijuana debris, there was no reasonable expectation of privacy insofar as looking into windows is concerned.

[5]Petitioner asserts that the discovery of the marijuana debris was impermissible because it was not "inadvertent" (Pet. 16). Although the United States does not believe that "inadvertence" is a necessary component of the "plain view" exception to the warrant requirement, the existence of such a component would not help petitioner because we do not rely on the "plain view" rule. We rely, instead, on the rule that what is not closed against public inspection is not the subject of Fourth Amendment protection—a rule that upheld the law enforcement activity in *Santana*, *Western Alfalfa*, and similar cases in the absence of any "inadvertence."

Once the agents had discovered that the airplane contained marijuana debris, they were entitled to seize the plane for forfeiture (21 U.S.C. 881(a)(4)) and thereafter to search the plane in their possession without a warrant. See *Cooper* v. *California*, 386 U.S. 58; *G.M. Leasing Corp.* v. *United States*, No. 75-235, decided January 12, 1977, slip op. 12-13.

The seizure and search of the airplane was supported by at least two other rationales as well. Airplanes are constitutionally indistinguishable from motor vehicles, which may be seized without warrants. The seizure was justified by exigent circumstances; aircraft are highly mobile, and petitioner might have returned and flown off. Cf. *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442. Once the plane had been seized for this reason, the officers were entitled to conduct a search because they had probable cause to believe that it contained evidence of crime.[6] *Chambers* v. *Maroney*, 399 U.S. 42, 46-52; *Texas* v. *White*, 423 U.S. 67. Moreover, the agents were entitled to search the plane whether or not there was probable cause to believe that it contained evidence of crime. The agents had probable cause to believe that the plane had just entered the United States without clearing Customs;

[6]Petitioner mistakenly relies on *Coolidge* v. *New Hampshire*, 403 U.S. 443, for the proposition that searches of vehicles require warrants. The search in *Coolidge* took place in the driveway of the owner's private residence. Searches or seizures of vehicles in other places present quite different problems, as *Texas* v. *White*, *supra*, and *G.M. Leasing*, *supra*, demonstrate.

they therefore were entitled to subject it to a border search. See 19 U.S.C. 1459 and 1460; *Carroll* v. *United States*, 267 U.S. 132, 154.

2. Petitioner contends (Pet. 16-20) that the evidence was insufficient to support his convictions. Both lower courts properly rejected this contention. Petitioner was driven to the Freeway Airport by Valenzuela. Petitioner then flew into Mexico without activating his navigation lights and was observed descending to a makeshift landing strip in an area known to officials to be a meeting point for narcotics smugglers. Thereafter, a plane with an engine similar to that of petitioner's landed in Arizona and unloaded a cargo of 500 pounds of marijuana, which McKittrick and Valenzuela retrieved. A short while later, petitioner's airplane was observed on the ground at a Phoenix airport, its engine still warm. Marijuana debris was inside. This evidence was more than sufficient to establish petitioner's participation in the crimes.[7]

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[7] Petitioner argues (Pet. 17) that the court of appeals incorrectly relied on evidence not in the record, namely, that he had flown to Mexico without filing the required flight plan. Even if petitioner is correct that no evidence was introduced to show the existence of such a requirement or of petitioner's non-compliance with it (see I Tr. 89; III Tr. 425), the evidence recited above remains ample to support the conviction.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1977.